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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 509

MALVIN VOLK, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings, conclusion and opinion of the Court of Claims (R. 12-20) are not yet reported.

JURISDICTION

The judgment of the Court of Claims (R. 20) was entered on June 5, 1951. A motion for a new trial was denied on October 2, 1951 (R. 20-21). The petition for a writ of certiorari was filed December 31, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly determined that just compensation for petitioner's machine gun tripods, requisitioned by the War Production Board pursuant to the provisions of the Act of October 16, 1941, 55 Stat. 742, as amended, was measured by their scrap value.

STATUTE INVOLVED

The pertinent portion of the Act of October 16, 1941 (55 Stat. 742), as amended by the Second War Powers Act (56 Stat. 181) is as follows:

> That whenever the President, during the national emergency declared by the President on May 27, 1941 * * * determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The President shall determine the amount of the

> fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims * * * in the manner provided by sections 24(20) and 145 of the Judicial Code * * * for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

STATEMENT

This is a companion case to *Albo Trading Corporation* v. *United States* (No. 508, this Term),[1] presenting virtually the same issues on similar and related facts.

On September 15, 1936, petitioner purchased 400 machine gun tripods from the Albo Trading Corporation at a price of $2.50 each. These tripods were described in the invoice as "Light miscellaneous tripods 'as is' 'where is'" (R. 12). On

[1] Evidence in the two cases was taken jointly and the decisions were handed down the same day.

March 2, 1937, petitioner purchased an additional quantity of 1,800 tripods from Albo for the price of $1.00 each (R. 13).

These tripods were part of the lot of surplus guns and accessories which Albo had purchased on August 14, 1933, from the Army Depot in Schenectady, New York.[2] Albo had made some sales of these tripods as souvenirs from the date of their requisition at $25.00 each, but discontinued making such sales in 1936 (R. 13).

Subsequent to his acquisition of these tripods, petitioner made sales of them to three purchasers. In December 1936, 300 were sold to the Greek Government at $48.50 each. Between December of 1940 and January of 1942, 507 were sold to Van Karner Chemical Arms Corporation, on eight separate sales, at a price of $50.00 each. In January of 1942, petitioner sold 30 tripods to Stafford Ordnance Corporation at $50.00 each, and 10 additional to the same purchaser at the same price in May 1942. All of such sales were made for petitioner by Albo Trading Corporation, which was paid for such services commissions ranging from 25 to 30 per cent. All of the sales subsequent to

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[2] The material so purchased had been described in the sale as "Lot #3 of scrap steel, consisting of 286,167 pounds of scrap steel," and had comprised 3,334 mutilated Marlin machine guns, 500 mutilated Hotchkiss machine guns, 2,173 of these tripods, 963 Krag rifles, 500,000 cores for bullets, and 1,515 pounds of miscellaneous machine gun parts. The total consideration paid by Albo for this lot of materials had been slightly less than $2,000 (R. 13).

the first were made through a broker named Ben Sagor (R. 13-14).

The great bulk of these sales, other than the 1936 sale made to the Greek Government, were made in conjunction with the sale of mutilated machine guns by Albo Trading Corporation. Five hundred of the tripods sold to Van Karner Chemical Arms Corporation were sold in conjunction with the sale of an equal number of Hotchkiss guns; the remaining seven were sold to that company for experimental purposes. Similarly, the sale of tripods to Stafford Ordnance Company, although not made simultaneously with the sale of guns to the company, was made to a concern which had previously acquired over 100 mutilated Vickers machine guns from Albo (R. 14). Furthermore, in connection with all of its sales of mutilated machine guns, Albo Trading Corporation agreed with the purchaser that he would have an opportunity to purchase an equal number of tripods, if he so desired (R. 14).

The tripods here involved are a 1916 modification of the basic 1914 Hotchkiss tripod. The Hotchkiss gun was a standard French weapon during World War I, and this tripod was designed for use with it. A few of these tripods were acquired by the United States Army during World War I and used for training purposes, but it was not a standard tripod for use by our troops. During the period between World War I and World

War II, the French had supplanted this tripod with a wholly new one. The principal differences between the two tripods were: (1) the new tripod was much lighter; (2) the new tripod was designed to permit more rapid mounting and dismounting of the gun; (3) the new tripod was designed so that it could be leveled by adjusting a single leg, rather than the two-leg adjustment required on the tripods here involved; (4) the new tripod was lower, so that the gunner would fire from a prone position, presenting a smaller target; (5) changes in machine gun tactics in World War II obviated the necessity of "indirect" fire (firing at targets not seen), but, on the other hand, required that the new tripod be adaptable to antiaircraft fire, which involved a redesign changing the maximum angle of elevation of the old tripod of 30 degrees to at least 65 degrees (R. 18).

The standard United States Army machine gun tripod in 1942 was the M-2. It differed from the tripod involved in this case in the same ways as did the World War II version of the Hotchkiss tripod. It, for example, weighed only 14 pounds, as compared to a minimum weight of 50 pounds for this vintage of Hotchkiss tripod, and an actual weight for these tripods of about 78 pounds. The M-2 could be set up for firing in less than five seconds, a substantially shorter time than was required with the model here involved. Similarly, the M-2 was lower and could be elevated for antiaircraft firing (R. 18).

The M-2 tripod was being manufactured and delivered to the United States Army during 1942 at the rate of from 15,000 to 20,000 a month, at an average price of $44.00 each. In November 1942, the combat situation had changed to such an extent that the production of this modern tripod could be curtailed by the Army (R. 18-19).

In addition to these changes in the tactical use of machine guns, the value of these tripods would have been decreased by the fact that there was only a relatively small quantity of them, which would have increased the costs of maintenance and replacement of parts, and the further fact that the only modern guns that could have been fired on these tripods would have been those fitted with an adapter to fit the tripod, thus depriving an important element of military equipment of the factor of interchangeability (R. 19).

On November 16, 1942, the War Production Board, acting through Metals Reserve Company, pursuant to the provisions of the Act of October 16, 1941 (55 Stat. 742), as amended, requisitioned and took possession of machine guns and parts therefor located at a number of points throughout the country. One of such locations was the warehouse of Albo Trading Corporation in New York City. At this location the Government took possession of 241 machine gun tripods and 46 tripod bases owned by plaintiff, as well as the entire stock of mutilated machine guns and parts of Albo Trading Corporation (R. 15).

A proof of claim was filed on petitioner's behalf with the War Production Board claiming compensation for the property requisitioned in New York City in the sum of $12,830 (R. 15). On August 10, 1943, the War Production Board determined that the value of the requisitioned property was represented by its scrap value of $212.00 and on September 21, 1943, made an award of compensation to petitioner in that amount (R. 16). On September 27, 1943, the Metals Reserve Company tendered this sum to petitioner and when it was rejected, tendered it 50 per cent of the award on November 11, 1943 (R. 16). Petitioner refused to accept any payment of the award (R. 16), and on January 19, 1948, instituted this suit in the Court of Claims alleging that the fair and reasonable value of the property taken was $12,830 (R. 1-3).[3] The Court of Claims concluded that the fair value of the materials requisitioned from petitioner was measured by its scrap value and that there was no satisfactory evidence of any secondary use of these tripods which was economically available in 1942, and affirmed the award by the War Production Board to petitioner of $212.00.

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[3] Petitioner also asked for $50,000 for 1,016 machine gun tripods in storage in Schenectady, New York, which were never requisitioned, but the sale of which was limited and controlled by the terms of a priority order issued by the War Production Board. Petitioner argued that such limitation and control constituted a taking even though the property was not expressly requisitioned. The Court of Claims held that Limitation Order L-230 did not constitute a taking and petitioner has not renewed his claim here.

ARGUMENT

This case presents the same issues as its companion case, *Albo Trading Corporation* v. *United States,* No. 508, this Term. In both cases, the War Production Board requisitioned material belonging to petitioners and awarded them compensation based on the scrap value of the material requisitioned. The evidence conclusively demonstrates that there was no market at the date of requisition for the machine gun tripods requisitioned in the instant case and that their only value was their scrap value. Nor does petitioner refer this court to any evidence or rule of law to justify a higher valuation. As the court below stated in its opinion (R. 19):

> It is evident from the testimony that the machine gun tripods requisitioned by the defendant were altogether outmoded at the time of their requisition. They had been so completely supplanted by improved models that they were no longer of any use. Their sole remaining value was the value of the material in them. We do not reiterate the reasons why they were no longer of any use for the purpose for which they were designed; these reasons are set forth in findings 11 to 13, [R. 18-19] both inclusive.
>
> Plaintiff is entitled to recover their scrap value, which was $212.00.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. For the reasons set forth

above and in the brief in opposition to certiorari in No. 508, this Term, *Albo Trading Corporation* v. *United States,* it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1952.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 918

MELVIN VOLK, *Petitioner*,

v.

THE UNITED STATES

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

October Term, 1951

No. 509

MALVIN VOLK, *Petitioner,*

v.

THE UNITED STATES

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The requisition of the property in this case was authorized by the Act of October 16, 1941. (Appendix to the Petition for Writ, page 9.) The property requisitioned (Albo, Plaintiff's Exhibit 10) covered

> "All machine guns, operating, non-operating or obsolete, and all parts therefor, and all cannon, grenades, bombs, or other military arms using explosives (other than pistols, rifles and shotguns) and ammunition for any of the foregoing (other than ammunition for pistols, rifles and shotguns)."

This requisition clearly indicated on November 16, 1942, the need on the part of the Respondent, for the articles listed in the requisition was immediate and pressing and such as will not admit of delay. Notwithstanding the allegation in the requisition, there had been no prior negotiations of any kind for obtaining the use of such property for the defense of the United States. It is to be noted that

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in the instant case the materials requisitioned were listed, whereas in the case of *Williams* v. *United States,* 111 Ct. Cl., 356 and *Shaffer* v. *United States,* 104 Ct. Cl. 229, where the Government was requisitioning old automobiles, they designated the material requisitioned as "scrap".

The present case differs from the *Van Karner Chemical Arms Corporation* v. *the United States,* 109 Ct. Cl. 425 and the *International Aircraft Trading Company* v. *United States,* 109 Ct. Cl. 435, cases in these major respects.

1. All of Petitioner's sales were made "as is" and "where is", the same as when these goods had been originally purchased by it.

2. Petitioner's tripods were unused, packed in their original factory cases, processed against rust and in perfect operating condition. (Albo, Sagor p. 84, Paley pp. 200, 201)

3. Petitioner never sold any of its tripods to the Respondent or any of its agencies.

4. Respondent never offered to sell Petitioner or its customers any of the modern tripods being manufactured for the Respondent or its Allies.

5. Petitioner's sales from 1936 through 1942, as admitted by Respondent, were bulk sales made after the guns purchased from Albo Trading Corporation had been reconditioned, as tripods were new and no repairs were needed. (Albo, Paley pp. 363-367)

6. Petitioner discontinued sale of tripods as souvenirs when higher market developed in connection with the sale of guns to be reconditioned, but residual market for tripods as souvenirs remained unimpaired. (Albo, Paley p. 381)

For all these reasons, Petitioner was not bound by any standards or specifications set by the U. S. Army or other Governmental agencies. The term, "obsolete", the quantities of the more modern Browning tripods which were available and the production rates therefore are clearly not applicable to this case.

The Petitioner's sales established that there was a market for the tripods up to the time of the requisition and these sales are determinative of the amount of just compensation that the Petitioner is to receive for the property requisitioned. The Respondent is bound by the market price of the materials requisitioned, that being the established price that was paid for the materials up to the time of the taking. The Respondent cannot determine the value of the property taken by the use that it subsequently made of the property taken.

Petitioner's market was only affected by the Acts of the Respondent herein, namely, their requisition of November 16, 1942 and its own Limitation Order L-230.

Respondent, on page 11 of the brief, quotes from the opinion of the Court in the *Van Karner* case, 109 Ct. Cl. 433-434 • • •

> "Had the defendant not requisitioned the guns, we have serious doubt that the plaintiff could have disposed of them at all, at least not until the next war."

Respondent only requisitioned the machine gun tripods in New York City belonging to Petitioner, for which it offered him scrap value. The major part of Petitioner's tripods stored at Schenectady, N. Y., were not requisitioned but were "frozen" by the Limitation Order L-230. The fact is that, although not in evidence, Petitioner, upon the revocation of the Limitation Order L-230, is now selling the tripods at Schenectady at reasonable prices for military use, even though there are no guns

available to be sold with the tripods, as originally contemplated by the parties.

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